

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case has been previously before the Board.³ The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On August 26, 2018 appellant, then a 53-year-old mail handler in modified duty status,⁴ filed a notice of recurrence (Form CA-2a), alleging that on July 26, 2018 he aggravated a May 19, 2007 lumbar injury accepted by OWCP for lumbosacral neuritis or radiculitis under OWCP File No. xxxxxx213 when he lifted heavy buckets of mail while in the performance of duty. He stopped work on July 30, 2018 and did not return. In a November 7, 2018 statement, appellant asserted that he exceeded his work limitations on July 26, 2018 by lifting heavy buckets.

In support of his claim, appellant submitted an August 6, 2018 report by Dr. Diane Lam, Board-certified in anesthesiology and pain management, who noted a history of a lumbar injury approximately 10 years prior, with a recent exacerbation of symptoms.⁵ Dr. Trina Barman, Board-certified in emergency medicine, provided August 29, 2018 reports relating appellant's 10-year history of chronic lumbar pain with a flare-up in July 2018 when performing "a lot of heavy lifting and pulling" at work. She diagnosed spinal stenosis at L5-S1. Dr. Teresa M. Amato, Board-certified in emergency medicine, submitted September 3 and 4, 2018 reports noting appellant's complaints of lumbar pain with right-sided radiculopathy.

Appellant underwent an L5-S1 hemilaminectomy on September 5, 2018.

On November 20, 2018 OWCP administratively created a new traumatic injury claim, assigned OWCP File No. xxxxxx041, as appellant had alleged a new traumatic incident, rather than a spontaneous worsening of the accepted May 19, 2007 lumbar injury under OWCP File No. xxxxxx213.

³ Docket No. 19-1326 (issued February 4, 2020).

⁴ Following an accepted lumbar injury in OWCP File No. xxxxxx213, appellant returned to work on August 4, 2009 for six hours per day, facing up metered mail and patching ripped letters and flats. Appellant's claims have not been administratively combined.

⁵ An August 22, 2018 magnetic resonance imaging (MRI) scan of the lumbar spine demonstrated severe central spinal canal stenosis, mild encroachment of the right neural foramen at L5-S1, disc herniation and mild stenosis at L4-5 with neuroforaminal encroachment, disc bulges with mild neuroforaminal encroachment at L2-3 and L3-4, and facet arthropathy.

In a development letter dated November 26, 2018, OWCP advised appellant of the additional evidence needed to establish his traumatic injury claim and afforded him 30 days to respond.

In response, appellant submitted a September 6, 2018 report by Dr. Steven Factor, a Board-certified neurophysiologist, who diagnosed a recurrent L5-S1 disc.

In a report dated December 5, 2018, Dr. William C. Wang, a physiatrist, noted that appellant sustained a lumbar injury while at work on May 19, 2007, with severe lumbar pain and left-sided radiculopathy. Appellant returned to limited-duty work, but experienced a severe flare-up of lumbar symptoms on July 30, 2018. Dr. Wang held him off work through December 30, 2018.

By decision dated January 7, 2019, OWCP found that appellant had established that the July 26, 2018 employment incident occurred as alleged; however, it denied the claim finding that the medical evidence of record was insufficient to establish a medical condition causally related to the accepted employment incident.

On February 11, 2019 appellant requested reconsideration. He submitted a January 29, 2019 report from Dr. Wang, who opined that the accepted July 26, 2018 employment incident “aggravated an earlier injury from May 2007.” Dr. Wang noted that appellant believed that the cumulative effect of lifting and carrying heavy objects while at work had contributed to the severe flare-up of lumbar radiculopathy on July 26, 2018.

By decision dated February 28, 2019, OWCP denied modification of its prior decision.

Appellant appealed to the Board. By decision dated February 4, 2020, the Board affirmed OWCP’s February 28, 2019 decision, finding that appellant had not met his burden of proof to establish a lumbar injury causally related to the accepted July 26, 2018 employment incident.

On April 14, 2021 appellant, through his then-representative, requested reconsideration. He asserted that an April 12, 2021 report by Dr. Tsai C. Chao, a Board-certified physiatrist, was sufficient to establish appellant’s claim.

In an April 12, 2021 report, Dr. Chao provided a history of injury and treatment and reviewed medical records. He noted that he first examined appellant on September 16, 2019. Dr. Chao opined that a September 4, 2018 lumbar MRI scan demonstrated possible indentation and compression of the thecal sac and right S1 nerve root, improved on a September 10, 2018 lumbar MRI scan. An October 30, 2019 lumbar MRI scan demonstrated degenerative disc disease in the lower lumbar spine, greatest at L5-S1 with posterior disc protrusion or herniation, mild spinal stenosis, and narrowing of the neural foramina. He opined that heavy lifting and pulling at work caused spinal stenosis necessitating the September 5, 2018 hemilaminectomy, as appellant was more susceptible to injury following the May 2007 lumbar injury.

By decision dated April 26, 2021, OWCP denied appellant’s request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁶ This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁷ Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS).⁸ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁹

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.¹⁰ If a request for reconsideration demonstrates clear evidence of error, OWCP will reopen the case for merit review.¹¹

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.¹² The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹³ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁴ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether

⁶ 5 U.S.C. § 8128(a); *see also* *A.B.*, Docket No. 19-1539 (issued January 27, 2020); *W.C.*, 59 ECAB 372 (2008).

⁷ 20 C.F.R. § 10.607(a).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (September 2020).

⁹ *G.G.*, Docket No. 18-1072 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁰ *See* 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499 (1990).

¹¹ *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); *supra* note 8 at Chapter 2.1602.5 (September 2020).

¹² *A.A.*, Docket No. 19-1219 (issued December 10, 2019); *J.F.*, Docket No. 18-1802 (issued May 20, 2019); *J.D.*, Docket No. 16-1767 (issued January 12, 2017); *Dean D. Beets*, 43 ECAB 1153 (1992).

¹³ *J.D.*, Docket No. 19-1836 (issued April 6, 2020); *Leone N. Travis*, 43 ECAB 227 (1999).

¹⁴ *S.W.*, Docket No. 18-0126 (issued May 14, 2019); *Robert G. Burns*, 57 ECAB 657 (2006).

the new evidence demonstrates clear error on the part of OWCP.¹⁵ To demonstrate clear evidence of error, the evidence submitted must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁶

OWCP's procedures further provide that the term clear evidence of error is intended to represent a difficult standard.¹⁷ The claimant must present evidence which on its face shows that OWCP made an error.¹⁸ Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹⁹ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.²⁰

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed.

As noted above, a request for reconsideration must be received within one year of the date of the last merit decision for which review is sought.²¹ As appellant's request for reconsideration was not received by OWCP until April 14, 2021, more than one year after the Board's February 4, 2020 decision, it was untimely filed.²² Consequently, he must demonstrate clear evidence of error by OWCP in its February 28, 2019 decision.

The Board further finds that appellant has not demonstrated clear evidence of error. On reconsideration appellant submitted Dr. Chao's April 12, 2021 report. Dr. Chao summarized a

¹⁵ *T.N.*, Docket No. 18-1613 (issued April 29, 2020).

¹⁶ *J.M.*, Docket No. 19-1842 (issued April 23, 2020).

¹⁷ *See supra* note 8 at Chapter 2.1602.5(a) (September 2020); *see also J.S.*, Docket No. 16-1240 (issued December 1, 2016).

¹⁸ *C.C.*, Docket No. 21-0896 (issued December 2, 2021); *R.G.*, Docket No. 21-0540 (issued November 9, 2021); *K.W.*, Docket No. 19-1808 (issued April 2, 2020).

¹⁹ *Id.*

²⁰ *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

²¹ *See supra* note 7.

²² According to OWCP's procedures, the one-year period for requesting reconsideration begins on the date of the original OWCP decision, but the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including any merit decision by the Board. *See supra* note 8 at Chapter 2.1602.4a (September 2020).

history of injury and treatment and reviewed imaging studies. He opined that heavy lifting and pulling at work on July 26, 2018 aggravated appellant's preexisting spinal stenosis caused by a May 19, 2007 employment injury. However, Dr. Chao failed to explain whether or how appellant's lumbar condition were related to the May 19, 2007 employment injury. Therefore, his report does not raise a substantial question concerning the correctness of OWCP's February 28, 2019 decision.

As noted, clear evidence of error is intended to represent a difficult standard.²³ Even a detailed, well-rationalized medical report, which if submitted before the denial was issued, would have created a conflict in medical evidence requiring further development is insufficient to demonstrate clear evidence of error. It is not enough to show that evidence could be construed so as to produce a contrary conclusion. Instead, the evidence must shift the weight in appellant's favor.²⁴

The Board finds that appellant's request for reconsideration does not demonstrate on its face that OWCP committed error when it found in its February 28, 2019 decision that he had not established an employment-related lumbar injury.²⁵ Therefore, OWCP properly determined that appellant did not demonstrate clear evidence of error in its February 28, 2019 decision.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

²³ See *supra* note 17.

²⁴ *M.E.*, Docket No. 18-1442 (issued April 22, 2019).

²⁵ See *S.F.*, Docket No. 09-0270 (issued August 26, 2009).

ORDER

IT IS HEREBY ORDERED THAT the April 26, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 10, 2022
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board